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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 132

SPECTOR MOTOR SERVICE, INC., a Corporation,
Appellant,

vs.

CHARLES J. McLAUGHLIN, Tax Commissioner,
DENNIS P. O'CONNOR, Substituted Defendant,
Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

APPELLANT'S BRIEF.

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Appellee.

APPELLANT'S BRIEF.

I.

Opinions of the Lower Courts.

Since this case has been before this court previously (323 U. S. 101) and then remanded so that a declaratory judgment might be obtained in the Connecticut state courts to resolve certain questions of state law, we submit the following chronological list of the opinions of the various courts which have passed on this case:

47 Fed. Supp. 671 (1942);
139 Fed. (2d) 809 (1943);
323 U. S. 101 (1944);
15 Conn. Supp. (Connecticut Superior Court) 205 (1947);
135 Conn. 37, 61 Atl. (2d) 89 (1948);
88 Fed. Supp. 711 (1949);
181 Fed. (2d) 150 (1950).

II.

Statement of Jurisdiction.

That the District Court had jurisdiction of this case under the provisions of the Johnson Act, 28 U. S. C., Sec. 1341, was decided by this court in its former opinion wherein it was stated, "This District Court had jurisdiction to entertain this bill and to give whatever relief is appropriate despite the Johnson Act and *Great Lakes Dredge Co.* v. *Huffman*, 319 U. S. 293, because of the uncertainty surrounding the adequacy of the Connecticut remedy" (323 U. S. 101 at page 105). Since that opinion, the Connecticut Supreme Court of Errors in its opinion in this very same case (135 Conn. 37, 61 Atl. (2d) 89) has cleared up the doubt as to the adequacy of the remedy in state courts and held that an action for declaratory judgment or for an injunction would lie in the state courts. We submit that that opinion, however, does not oust the federal courts of jurisdiction. It was pointed out in *Dawson* v. *Kentucky Distillers Co.*, 255 U. S. 288, that where no adequate state remedy was apparent when an action was instituted in the federal courts, federal jurisdiction was not defeated by a later opinion of the state supreme court indicating an available remedy. See also *American Life Insurance Co.* v. *Stewart*, 300 U. S. 203, 215.

Moreover, in this particular case, if the federal courts were to deny themselves jurisdiction, the plaintiff would be without a remedy in any court, because the Connecticut Supreme Court of Errors has specifically refused to decide the only issues left in the case, holding it is for the federal courts to do so. In

this particular case, it would seem that even today there is no "plain, speedy and efficient remedy" in the state courts and for that reason alone the United States courts have jurisdiction.

The Court of Appeals acquired jurisdiction by virtue of the defendant's appeal pursuant to the provisions of 28 U. S. C., Sec. 1291. This court had jurisdiction to grant plaintiff's petition for certiorari and to hear this appeal by virtue of the provisions of 28 U. S. C., Sec. 1254 (1) which authorizes this court, upon petition of a litigant, to cause a case to be certified to it from the Court of Appeals for final determination.

The judgment of the Court of Appeals sought to be reviewed was entered on March 29, 1950, and the petition for certiorari was filed in the office of the clerk of this court within ninety days of the entry of said judgment as provided for in 28 U. S. C., Sec. 2101c. and granted on October 9, 1950.

III.

Statement of the Case.

This case, now that all the questions of local law have been eliminated, raises the question whether the Connecticut Corporation Business Tax Law (printed in the Appendix) which is a tax upon the franchise of a corporation for the privilege of doing business in Connecticut, is in violation of the United States Constitution when it is sought to be applied to the plaintiff, a Missouri trucking corporation, engaged exclusively in interstate commerce.

The action to enjoin the assessment of tax by the defendant State Tax Commissioner and for a declara-

tory judgment holding that the plaintiff was not liable to pay such franchise tax, was begun in the United States District Court for the District of Connecticut where the court (Smith, *J.*) enjoined the defendant commissioner from collecting the tax on the ground that the act was not intended to apply to the plaintiff for, if it were, it would be unconstitutional (47 Fed. Supp. 671 (1942)). That decision was reversed by the United States Court of Appeals for the Second Circuit, one judge dissenting (139 Fed. 2d 809 (1943)), on the ground that the act was intended to apply to the plaintiff and was constitutional. On appeal to this court, the case was remanded to the District Court (323 U. S. 101 (1944)) until such time as questions of local law might be decided by the state courts of Connecticut. Accordingly, the plaintiff brought an action for declaratory judgment in the Superior Court for Hartford County asking that the Corporation Business Tax Act be held not applicable to it and, if applicable, that it be declared unconstitutional. It also claimed the computation of the tax improper. The Superior Court (Comley, *J.*) held that the act was intended to apply to the plaintiff and was therefore in violation of the United States Constitution (15 Conn. Supp. 205 (1947)). On appeal, the Connecticut Supreme Court of Errors held that the act was applicable to the plaintiff and resolved all questions of local law against the plaintiff. It further held that it imposed "a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state whether they be domestic or foreign". The court, however, refused to pass on the federal constitutional questions, holding that in view of the decision of this court "it is not for us to trench upon its right to decide those (constitu-

tional) issues". (*Spector Motor Service, Inc.* v. *Walsh*, 135 Conn. 37, 41 (1948).)

Thereupon the defendant commissioner moved in the United States District Court of the District of Connecticut for the dissolution of the injunction which Judge Smith had issued in 1942. From Judge Smith's decision refusing to dissolve the injunction (88 Fed. Supp. 711 (1949)), the defendant appealed once more to the United States Court of Appeals for the Second Circuit. The case there was argued before Judges Swan, Clark and Frank. The District Court was again reversed (181 Fed. (2d) 150 (1950)), by the opinion of Judges Clark and Frank (who had also heard the earlier appeal). A dissent was filed by Judge Swan "for the reasons stated by the District Judge and by Judge Learned Hand in his dissent on the former appeal". We ask reversal of the decision of the Court of Appeals for the Second Circuit.

As to the facts, the plaintiff is a Missouri corporation formed in 1933 with administrative headquarters in Chicago (R. 100). It is engaged exclusively in hauling freight by motor truck in interstate commerce (R. 101). Its interstate operations extend into the State of Connecticut in that it carries freight into Connecticut from points outside the state and also carries freight from Connecticut to points outside the state (R. 101). It does no intrastate business in Connecticut in fact (R. 102). It operates under permits issued by the Interstate Commerce Commission and by Public Utilities Commission of the State of Connecticut, all of which limit its activities to interstate commerce (R. 102). Its operations are not only interstate but are also interzone, in that it transports

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The symbol R. refers to the Record filed in this court.

freight from Illinois and Missouri to the eastern seaboard and does not serve intermediate states (R. 16), with one exception: by purchase of another carrier, it obtained the right to transport freight in interstate commerce from Illinois to Missouri and vice versa (R. 22). The routes over which the plaintiff's trucks operate within the individual states are prescribed by the Interstate Commerce Commission (R. 16).

The plaintiff has two terminals in Connecticut, one in New Britain and one in Bridgeport, both under lease (R. 101). In connection with the leasing of the New Britain terminal, the landlord insisted that the plaintiff qualify as a foreign corporation and name the Secretary of the State as its agent for service so that it would be subject to the jurisdiction of the Connecticut courts in the event there should be litigation arising out of the leasehold but the plaintiff has never applied for or received authority to operate in intrastate commerce (R. 102).

The plaintiff owns no real estate in Connecticut (R. 27). It owns personal property consisting mostly of office equipment in New Britain and Bridgeport valued at approximately $2,000. It has maintained a bank account at Bridgeport where cash payments received by it from customers might be deposited but no one in Connecticut had authority to draw on that account (R. 27). Payments received by check are placed in an envelope and sent to Chicago (R. 27). Payments received in cash in New Britain are converted into a cashier's check or bank draft and mailed to Chicago (R. 27). There is a petty cash account kept at New Britain. Expenses and salaries are paid by drafts drawn on Chicago (R. 27). At the period in question, there were seventeen employees of the plaintiff at the New Britain terminal and ten at the Bridgeport terminal, all engaged in the actual running of

those terminals (R. 24, 25). The plaintiff has no salesmen as such because as a common carrier it is obligated to serve all but it has two or three representatives at a time, whose business it is to promote the interests of the plaintiff by contacts with the trade and by ironing out whatever difficulties may arise between customer and carrier (R. 28). All the trucks used by the plaintiff are leased from the owners thereof (R. 26). A substantial number of them are leased from Wallace Transport Company, whose stockholders are the same as the stockholders of the plaintiff (R. 30).

The operations of the plaintiff may be described as follows: on receiving a call from a customer desiring to ship a full truck load from New Britain to Chicago, the plaintiff will dispatch a truck to the customer's platform, take on the load and take it directly to the consignee's platform. The freight charges may be prepaid or charged or collected from the consignee. If the load to be transported is less than a truck load, the plaintiff will, instead of dispatching one of its over the road trucks to the customer's platform, send a pick-up truck. This pick-up truck will carry the freight into the local terminal where it will be sorted according to destination, nature of commodity and size of shipment. The pick-up trucks, like the over the road trucks, are leased from their owners but some, which were locally garaged, have been registered in the name of the plaintiff. After sorting, the freight will be loaded on an over the road truck and carried to the terminal in Chicago where the process of sorting is reversed and the freight eventually reaches the consignee's platform from a pick-up truck operating out of the Chicago terminal (R. 36-47).

Under Interstate Commerce regulations, all drivers of trucks used by Spector are considered Spector's

employees and are carried on the payroll as such (R. 64).

On this set of facts, the defendant's predecessor in office, purporting to act under the Corporation Business Tax Act of 1935, as amended, has assessed the plaintiff for taxes claimed to be due for the years ending May 31, 1936, May 31, 1937, May 31, 1938 and for the period ending December 31, 1938 and for the years ending December 31, 1939 and December 31, 1940, totalling $7,795.50 as of January 7, 1942 (R. 103).

IV.

Questions Presented.

This case presents two questions as set forth in our petition for writ of certiorari as follows:

1. The first is that the Connecticut Corporation Business Tax Act is unconstitutional because, in violation of the commerce clause of the United States Constitution (Article I, Section 8), it is an attempt by a state to impose an excise upon the right of the plaintiff to engage exclusively in interstate commerce.

2. The second is that the act is unconstitutional because it is in violation of the due process clause of the United States Constitution (Article XIV, Section 1, of the Amendments) as applied to the plaintiff.

In defining net taxable income the statute (419C Cum. Supp. General Statutes) did not allow "rent" to be deducted from gross income. The defendant

has held that the cost of hiring trucks (which amounts to 60% of the plaintiff's operating expense) is "rent" and therefore not deductible. As a result, the assessment is not a tax on net income but approaches a tax on gross income in interstate commerce and is therefore unfair, discriminating and in violation of due process.

V.

Summary of Argument.

A. The Connecticut Corporation Business Tax Act is unconstitutional because it is in violation of Article I, Section 8, of the Constitution of the United States.

B. The Act is unconstitutional because it is in violation of the due process requirements of Article XIV, Section 1, of the Amendments to the Constitution of the United States as applied to the plaintiff.

C. The plaintiff and the industry are fully taxed.

VI.

Argument.

A.

The Connecticut Corporation Business Tax Act is unconstitutional because it is in violation of Article I, Section 8, of the Constitution of the United States.

This is the eighth time this case has been briefed and argued before a court. The court opinions contained in the record present a mass of argument and

authority which we do not deem it necessary to repeat. While this case is of such importance that it would ordinarily call for a lengthy brief, we do not think it necessary in view of the extended discussions by the lower courts, which are contained in the record, to present to this court a brief which would be merely a repetition of material already before this court.

We may start with two basic assumptions upon which all courts which have reviewed this case have agreed. The first is that Spector Motor Service, Inc. has only the right to engage in interstate and in fact does engage exclusively in interstate commerce. The District Court so found (R. 102) as did the Court of Appeals (R. 110) and the Superior Court and Supreme Court of Errors of Connecticut (R. 146). We do not understand that the defendant seriously disputes that fact. The second assumption which now may be safely made since the opinion in this case by the Supreme Court of Errors, is that the tax in question is not an income tax nor tax upon the privilege of using Connecticut highways but it is "a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state whether they be domestic or foreign" (*Spector Motor Service* v. *Walsh*, 135 Conn. 31, 56, see R. 156). Thus is posed the very serious constitutional question as Judge Hand phrased it in the court below: may a state levy "an excise directly upon the privilege of carrying on an activity which is neither derived from the state, nor within its power to forbid" (R. 133). Or as this court in its previous opinion on this case said "If Connecticut, in fact, sought to tax the right to engage in inter-

state commerce, a long course of constitutional history and an 'unbroken line of decisions' would indeed be brought into question" (323 U. S. 101, 103). We submit that the language of this court in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1946) is apropos.

> "The simple but controlling question is whether the state has given anything for which it can ask return."

We, of course, concede that when a state confers a privilege upon a person who is engaged in interstate commerce it may exact a tax upon the privilege granted. In fact, the plaintiff itself pays taxes to the state of Connecticut and its subdivisions for such privileges by means of gasoline taxes, property taxes and the like. But it does not protest against paying a tax to the state of Connecticut upon the privilege of engaging in interstate commerce which that state can neither confer nor take away. Thus, this case is easily distinguishable from those cases which exact a tax in return for some service rendered. We do not question that "interstate commerce must pay its way." Thus it has been held constitutional to tax the operation of interstate buses for the upkeep of the highways used by the buses (*Interstate Busses Corp.* v. *Blodgett*, 238 U. S. 245). Likewise, where a corporation is engaged both in intrastate and interstate commerce, the local business will support a franchise tax measured by income reasonably attributed to intrastate business (*Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113). A property tax may constitutionally be imposed by a state on property physically located within that state although used exclusively in interstate commerce (*Postal Telegraph*

Cable Co. v. *Adams*, 155 U. S. 688). A non-discriminatory net income tax (*Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435) and use and sales taxes affecting such property have been recognized. (See *McGoldrick* v. *Bernind-White Co.*, 309 U. S. 33 (1939), and *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335 (1943).[9] There are many ways in which a state may make interstate commerce pay its way, as pointed out by Chief Justice Hughes in *Cooney* v. *Mountain States Telephone Co.*, 294 U. S. 384, 392 (1934), but it may not constitutionally tax the right to engage in interstate commerce (*Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203 (1925), and *Anglo Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218 (1933)). The Connecticut legislature insists on taxing interstate commerce in the one way in which it cannot constitutionally be done.

But where, as here, a state attempts to tax the right to engage in interstate commerce it runs up against a constitutional impediment which has been sustained by an unbroken line of decisions.

> *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 44 A. L. R. 1219;
> *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555;
> *New York ex rel.* v. *Knight*, 192 U. S. 21;
> *Anglo Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218;
> *Cooney* v. *Mountain States Telephone Co.*, 294 U. S. 384;
> *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90.

The Court of Appeals seems to recognize the distinction between this case, involving a tax on the right to engage in interstate commerce, and those

cases (samples of which we have cited above) where a tax upon a state-granted privilege is involved. It dismissed that distinction however as a "barren one indeed" (R. 119). While recognizing that the cases decided by this court would invalidate the statute in question, the Court of Appeals upheld the statute because foreshadowing "trends" (R. 118), it felt, indicated that this court was about to reverse an unbroken line of decisions. The rationale of the majority of the Court of Appeals is expressed in its first opinion in this language referring to the case of *Alpha Portland Cement Co.* v. *Massachusetts, supra,* which we had claimed to be controlling:

> "When, however, a corporation is engaged within a state solely in interstate commerce, it must be conceded frankly, and this is the basis of the thoughtful conclusion of the court below, that the Supreme Court to date has held it immune from net income taxation by that state. * * * If that were the whole story or if further our duty were limited to picking the closest unoverruled analogy in reported cases and following that blindly and mechanically, we should hold that these cases, and particularly the *Alpha Cement* case, had foreclosed all further discussion. But that is far from the whole story; the trends noted above have gone further in several specific cases fundamentally close to this and in divisions in the Court itself, which are certainly not without significance in forecasting the future course of the law. And our function cannot be limited to a mere blind adherence to precedent. We must determine with the best exercise of our mental powers of which we are capable that law

which in all probability will be applied to these litigants or to others similarly situated."

In its more recent opinion, the same majority reiterated its views as follows:

"When we had this case before us six years ago we expressed the view that earlier decisions, of which *Alpha Portland Cement Co.* v. *Commonwealth of Massachusetts*, 268 U. S. 203, was the principal authority, were against the validity of a state tax levied upon even net income of a corporation engaged solely in interstate commerce. But on examination of the broad trends in favor of the state-taxing power shown by the Supreme Court, we concluded that the *Alpha Portland Cement* case and its progeny were no longer controlling and that as of that date the validity of such a tax as this would be sustained. We are now called upon to re-examine our conclusions to see if, as indeed the learned trial judge thought, later developments show that we were in error.

Before embarking upon this task, we think it needful that we redefine what we conceive to be our functions as judges of a constitutionally inferior court; for it seems to have been thought in some quarters that our previous attempt to study doctrinal trends as to the fate of state taxation in interstate commerce was only an endeavor to guess the votes of Supreme Court justices. We certainly have no desire either to psychoanalyze or to Gallup-poll the Court and its newer members, nor do we conceive that to be greatly useful to it or to others. We recognize, too, that it would be futile and undignified

not to yield obeisance to ancient precedents solely because we personally think they have outlived their usefulness; but it would be equally futile to press them upon the parties when they are no longer more than wraiths."

What the Court of Appeals overlooked, we submit, is the vitality of the principle that the right to engage in interstate commerce may not be taxed even though such commerce may be made to pay its way. Whether one examines majority or minority opinions in recent cases in this court one finds adherence to the principle that a franchise tax of this type is void. In *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542 (1950), Mr. Justice Black, speaking for the majority, said at page 544:

> "Courts have invoked the commerce clause to invalidate state taxes on interstate carriers only upon finding that: (1) the tax discriminated against interstate commerce in favor of intrastate commerce; (2) the tax was imposed on the privilege of doing an interstate business as distinguished from a tax exacting contributions for road construction and maintenance or for administration of road laws; or (3) the amount of the tax exceeded fair compensation to the state."

In *Joseph* v. *Carter and Weekes Stevedoring Co.*, 330 U. S. 422 (1947), Mr. Justice Douglas dissenting said at page 445:

> "Taxes designed to make interstate commerce bear a fair share of the cost of local government from which it receives benefits have been upheld; taxes which discriminate against interstate com-

merce, which impose a levy for the privilege of doing it, or which place an undue burden on it have been invalidated."

What the lower court failed to realize, we submit, is the basis of the constitutional prohibition against a franchise tax of this type. What this court said in the *Joseph* case in explaining why a tax on gross receipts from interstate commerce is apropos to the present case (p. 433).

> "We reaffirm the rule of *Puget Sound Stevedoring Company.* 'What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.' *Freeman* v. *Hewit, supra,* p. 256. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences. Not only does it follow a line of precedents outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus in port cities and transportation or handling centers, without discrimination against out-of-state as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause."

It must be remembered also, as Judge Hand has said, that the states have "representation in Congress

which the nation has not in their legislatures" (R. 134) so that interstate commerce stands in need of constitutional protection.

In discussing "doctrinal trends" which the Court of Appeals felt justified its failure to follow the admitted direct precedents, that court cited a number of cases which undoubtedly will be relied on by the appellee. We submit those cited cases do not weaken the principle that a state franchise tax on the right to engage in interstate commerce is invalid. They are merely further examples of cases where interstate commerce is required to pay a tax on a locally granted privilege. For instance, to take the most recent cases cited: *West Publishing Co.* v. *McColgan*, 328 U. S. 823 (1946) is a *per curiam* decision affirming 27 Calif. (2d) 705, 166 Pac. (2d) 861. It involved an income tax not a tax on the corporation's right to engage in interstate commerce. The Supreme Court of California was well aware of this distinction as the following paragraph from page 863 of the Pacific Reporter shows:

> "'A franchise tax is a tax imposed upon a corporation for the right or privilege of being a corporation or doing business in a corporate capacity' (cases cited). Such a tax is inapplicable to a corporation engaged exclusively in interstate commerce for 'a state may not impose a charge for the enjoyment of a right granted by the federal constitution.' Thus it may not exact a license tax for the privilege of carrying on interstate commerce . . . although it may tax the property used in or the income derived from that commerce so long as the taxes are not discriminatory" (cases cited).

Butler Bros. v. *McColgan*, 315 U. S. 501 (1942) involved a franchise tax on a corporation doing both an interstate and a local business. Likewise *International Harvester Co.* v. *Evatt*, 329 U. S. 416 (1946) and *International Harvester Co.* v. *Wisconsin Department of Taxation*, 322 U. S. 435 (1944) involved respectively a franchise tax and a privilege dividend tax on a foreign corporation authorized to do business in and having local manufacturing plants in the taxing states. To the same effect is *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940) involving a privilege dividend tax on a chain store corporation. So in *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80 (1947) and in *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662 (1949) this court was passing on a statute which the Supreme Court of Mississippi had held imposed a tax in recompense for the protection of the taxpayer's local activities. In *Capitol Greyhound Lines* v. *Brice, supra*, the tax was a property tax on vehicles used in interstate commerce. None of these cases involves a franchise tax on the right to engage in interstate commerce.

Some parts of the opinions of the Court of Appeals make it appear that the court may have misapprehended the nature of the tax in the case at bar. A good section of the first opinion of that court (R. 118-122) is devoted to showing that probably a net income tax levied by a state on a corporation engaged in interstate commerce is valid. When the court came to consider the case on the second appeal, it had the advantage of the opinion of the Supreme Court of Errors. That court specifically held the tax was a tax on the right to engage in business in Connecticut. It rejected the idea that it was an income tax or as the Court of Appeals had suggested a tax in recompense

for the use of Connecticut's highways (R. 156). Nevertheless in its second opinion the Court of Appeals still persisted in speaking of this tax as an income tax. See R. 201 where the Court of Appeals said:

> "Under this test only can substantial question be raised as to the tax before us; but applying it also we conclude that the present tax is valid since it is fundamentally a net income, rather than a gross receipts tax."

At any rate whether or not the majority of the Court of Appeals fell into error because it persisted in construing the tax as an income tax despite the view of the Connecticut Supreme Court of Errors the fact remains that the tax is a franchise tax on the right to engage in interstate commerce.

The Court of Appeals has laid emphasis on the fact that the plaintiff qualified to do business in Connecticut. The District Court found (R. 102) that this was done at the request of plaintiff's Connecticut landlord in order to make plaintiff subject to the jurisdiction of the Connecticut courts in case of disagreement over the lease. There is no dispute that the plaintiff can not legally and in fact does not engage in any but interstate commerce (R. 102). This, the Court of Appeals says (R. 120), is due to the plaintiff's failure merely to comply with "regulations . . . of a police nature". It ignores the fact that the limitations upon the plaintiff's activities confining them to interstate commerce are fixed by the Interstate Commerce Commission as well as by the Public Utility Commission of Connecticut (R. 102). The order of the Interstate Commerce Commission under which plaintiff operates even fixes the plaintiff's routes and limits the plaintiff not only to interstate commerce but even

confines it to interzone commerce (R. 16-19). The permit issued by the Public Utility Commission is for interstate commerce only (R. 10).

Under these circumstances the plaintiff's qualification in Connecticut conferred no rights. It only subjected the plaintiff to the burden of being subject to the jurisdiction of the Connecticut courts. Accordingly, we submit that such qualification is not sufficient to confer upon Connecticut a right to impose the franchise tax in question.

Ozark Pipe Line Corp. v. *Monier, supra;*
Anglo Chilean Corp. v. *Alamaba, supra.*

There is nothing in *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334 and *Flint* v. *Stone Tracey Co.*, 220 U. S. 107 to the contrary. The *Michigan* case involved the question whether a receiver actually operating a domestic corporation was subject to a state franchise tax to which the corporation, if not in receivership, would have been. It was held that the receiver was liable.

In the *Flint* case the question was the power of the federal government to tax businesses operating under franchises issued by the state governments—a power which springs from the Constitutional grant of taxing powers to the federal government and has no connection with the commerce clause. Besides, this court held in that case that the tax "is imposed not upon the franchises of the corporation irrespective of their use in business nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof" (p. 145).

On reason and authority we submit the statute here in question to be unconstitutional as being in violation of the commerce clause.

B.

The Act is unconstitutional because it is in violation of the due process requirements of Article XIV, Section 1, of the Amendments to the Constitution of the United States as applied to the plaintiff.

As we have seen, the Connecticut Supreme Court of Errors has held the tax in question to be a tax upon the plaintiff's right to do business in Connecticut. Necessarily, such a tax is discriminatory when applied to the plaintiff. It burdens interstate commerce without conferring any benefits, whereas intrastate corporate operators secure a genuine privilege in exchange for the tax. In that sense, the statute discriminates against foreign corporations like the plaintiff in a manner not only offensive to the commerce clause but also to the due process clause.

In another particular, the statute as applied to the plaintiff is in violation of due process. The plaintiff owns no trucks except, as it may be said, for a few pick-up trucks which are registered in its name (R. 25, 26). It obtains the trucks needed in its business from owners, by contract. Obviously payments made to such owners by the plaintiff are its greatest single item of expense. The accountant, Mr. Arnold (R. 61, 62), testified that this item of purchased transportation (as it is called under Interstate Commerce Commission accounting practice) amounts to approximately 60% of the total expense of Spector Motor Service. The statute did not allow "rent" as a deduction. The defendant construes this item of purchased transportation to be "rent". Certainly under these circumstances the defendant's refusal to allow this

large operating expense to be deducted makes this assessment no longer a tax on net income but approaches a tax on gross income from interstate commerce. Such taxation, standing alone, has been repeatedly and recently condemned by this court (*Gwin* v. *Henneford*, 305 U. S. 434, and cases cited; *Joseph* v. *Carter and Weekes Stevedoring Co., supra*).

Exhibit 15, as explained by Mr. Arnold (R. 53-56), shows the essential unfairness of the tax as computed by the defendant. If all the other states through which the plaintiff operates imposed a similar tax, a total tax of $5,339.76 would have been payable out of a net income of $111.39 for the last seven months of 1938; out of a net income of $46,064.34 for the year 1939 the tax payable would be $15,442.91; and out of net income of $10,505.86 for the year 1940 the tax would be $20,495.86. The net income above mentioned is net income for federal income tax purposes. If such a tax were upheld, its burden on interstate commerce is at once apparent. The demands made by the state do not represent all that can be demanded if the tax is approved. What one state can do all can do. Thus a local business would be affected but little, whereas interstate commerce would feel the full effect of a tax enforced in many states in such a way as to cripple the interstate business. Further in still another particular, Exhibit 15 illustrates perfectly that this type of taxation is a destructive burden on interstate commerce in that it appears from that exhibit that the tax increases proportionately with the gross income but has no relation to the net income. In 1940 with a gross income of $1,723,510.65 and a net of $10,505.86 the tax is $20,495.86. In 1939 with a gross income of $1,202,210.35 and a net of $46,064.34 the tax is $15,442.91, and in 1938 (seven months) with

a gross income of $432,087.39 and a net of $111.39 the tax is $5,339.76.

For these reasons, the assessment is unfair and inequitable and a violation of due process.

It is significant that since this litigation began, the Connecticut legislature has amended the act so that now "rent" is a deductible item. (See Section 1898, Conn. General Statutes, Revision of 1949.)

It is also significant that without legislative sanction, the State Tax Department had adopted as a rule of thumb, a policy of allowing 60% of the cost of purchased transportation as an operating expense and disallowing the remaining 40% (R. 103). Obviously, it was felt by the department that the cost of purchased transportation was not rent and that some compromise should be adopted. It appears from the testimony of Mr. Steege, Director of the Corporation Division of the State Tax Department (R. 75-80), that the department on the basis of experience of contract carriers estimated that of the cost of hiring trucks 60% could fairly be considered as an operating expense and 40% representing the value of the use of the vehicle. But the payments here made are not solely for the "use of the vehicle," but represent the cost of operating the vehicle. If reasonable with respect to contract carriers, which is improbable, it is not fair in the present case and the District Court so found (R. 103). As Exhibit 16 shows, every cent paid by the plaintiff to its chief lessor, Wallace Transport Co., is used by the company for operating expenses. Exhibit 16 breaks down the operating expenses of Wallace, so that it is obvious that none of the revenue received by Wallace is in reality "rent." If Spector owned the trucks, every penny now paid to Wallace would be used by Spector to operate those

trucks. So that the 60-40 allocation adopted by the department is not equitable so far as this plaintiff is concerned. If taxable at all, it is entitled to a deduction of one hundred per cent of the cost purchased transportation.

Moreover, as pointed out by Mr. Fisher (R. 80-84), an allocation suitable for contract carriers or short-haul carriers, is not fair to long-haul carriers like the plaintiff. Yet it was admitted by Mr. Steege that his figures come from contract carriers (R. 76-78) and this is confirmed by Mr. Fisher (R. 81).

Accordingly, there is ample evidence to support the District Court's finding that the rule of thumb, applied by the defendant in this case, was not based on any analysis of the plaintiff's records (R. 103) but was based on the experience of other carriers whose methods of operations varied so from the plaintiff's as to make no fair comparison between them possible (R. 103). It follows that the action of the defendant in allowing a deduction of only 60% of the cost of purchased transportation cannot stand, in the face of the showing made by the plaintiff.

For all these reasons, we submit the assessments are unfair and discriminatory and a violation of due process.

C.

The plaintiff and the industry are fully taxed.

At this point may we say that large sections of the defendant's previous briefs were devoted to an attack on the plaintiff because it does not pay as much taxes to various governmental units as the defendant feels it should. The Court of Appeals has given weight to

this argument (R. 123). While this attack may have no great legal significance, we think it important enough to spend enough time on it to demonstrate that it is unsound and not based on fact. The claim, in part, seems to be that if there are two possible methods of doing business, the one which calls for the maximum imposition of taxes is the only one which is morally correct. As we read the briefs, there was no claim that there has been any illegal evasion of justly due taxes by the plaintiff. Rather the claim seems to arise out of an ethical concept that one is obligated to pay the sovereign not only the taxes which the statute says one must but also an added sum if by conducting one's business in an inefficient and uneconomical manner one might have become subject to an additional tax.

Further, the defendant's briefs have been completely in error in saying that the plaintiff "has avoided paying corporation taxes to any state where it transacts business". The record shows that the plaintiff pays franchise taxes as required in Missouri, where it is incorporated, and Illinois, where it has its administrative headquarters, and that it pays a myriad of taxes to the states through which it operates as well as to the Federal Government. Apparently the defendant objects because the states do not assess as much taxes against the plaintiff as they constitutionally might. We doubt if this type of argument will be helpful to the court in deciding the constitutionality of the statute here in question.

As a matter of fact, the "comparative immunity from taxation" which the majority opinion of the Court of Appeals spoke of proves to be non-existent when we consult the reports compiled by the Interstate Commerce Commission for the years 1939 to 1942 when the taxes here in question were assessed.

The following table reprinted from our last brief in this court is designed to show the plaintiff's net profit experience as compared to the industry in general. From this table, it may be seen that the industry could no more stand the Connecticut tax burden than could the plaintiff.

(Figures taken from Interstate Commerce Commission reports for the years mentioned on "Statistics of Class I Motor Carriers of Property Engaged Preponderantly in Intercity Service.")

National Statistics

Year	Operating Income	Operating Expenses	Net Operating Revenues	% Net to Gross
1942	$587,869,636	$556,472,133	$31,397,503	5.5%
1941	560,166,612	533,232,281	26,934,331	4.8%
1940	431,052,674	412,040,349	19,012,325	4.4%
1939	378,473,829	359,784,771	14,894,134	3.9%

I. C. C. Statistics for Spector Motor Service, Inc.

Year	Operating Income	Operating Expenses	Net Operating Revenues	% Net to Gross
1942	$2,384,802	$2,416,644	$31,842(D)	1.3% (D)
1941	2,478,984	2,434,068	44,916	1.8%
1940	1,724,955	1,712,804	12,151	0.7%
1939	1,204,590	1,157,962	46,580	3.8%

The following table shows the tax burden upon Class I Motor Carriers of Property with comparative figures for Motor Carriers of Passengers and for Class I Railroads, wherein it appears that, contrary to the intimation of the majority opinion, the motor carrier industry is bearing more than its fair share of taxation.

(Figures taken from Interstate Commerce Commission reports for the years mentioned on Class I Motor Carriers and Class I Railroads.)

Year	Operating Income	Net Operating Revenue	Operating Taxes	% of Taxes to Gross	% of Taxes to Net
(Motor carriers of Property, omitting 000)					*
1942	$587,869	$31,397	$40,100	6.8%	130.%
1941	560,166	26,934	40,231	7.1%	150.%
1940	431,052	19,012	31,503	7.3%	160.%
1939	378,473	14,894	26,636	7.0%	180.%
(Motor carriers of Passengers, omitting 000)					
1942	$251,192	$86,727	$18,722	7.4%	23.%
1941	148,876	28,955	14,134	9.5%	43.%
1940	114,741	16,267	11,606	10.1%	72.%
1939	113,458	18,821	11,456	10.1%	63.%

(Interstate Commerce Commission statistics for Class I Railroads, omitting 000)

Year	Operating Income	Net Operating Revenue	Operating Taxes	% of Taxes to Gross	% of Taxes to Net
1942	$7,465,822	$2,864,739	$248,230	3.3%	8.8%
1941	5,346,699	1,682,467	223,937	4.1%	13.9%
1940	4,296,600	1,207,183	214,914	5.0%	17.9%
1939	3,995,004	1,006,794	236,946	5.9%	26.3%

* This column interpolated.

CONCLUSION.

For the foregoing reasons the plaintiff prays that the judgment of the United States Court of Appeals be reversed and the judgment of the District Court be affirmed.

Respectfully submitted,

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APPENDIX.

Section 418c, 1935 Supplement to the General Statutes:

Sec. 418c. Imposition of tax. Every mutual savings bank, savings and loan association and building and loan association doing business in this state, and every other corporation or association carrying on business in this state which is required to report to the collector of internal revenue for the district in which such corporation or association has its principal place of business for the purpose of assessment, collection and payment of an income tax, except (1) insurance companies, (2) companies principally engaged in the transportation and communication business and subject to the gross earnings taxes under chapters 70, 71 and 72, (3) companies principally engaged in manufacturing, selling or distributing gas, electricity or water and subject to the gross earnings tax imposed under chapter 73 and (4) companies all of whose properties in this state are operated by companies subject to taxation under chapters 70, 71, 72 and 73, shall pay, annually, a tax or excise upon its franchise for the privilege of carrying on or doing business within the state, such tax to be measured by the entire net income as herein defined received by such corporation or association from business transacted within the state during the income year and to be assessed at the rate of two per cent; provided in no case shall the tax be less than the minimum tax as computed under section 421c and provided, when any company taxable under chapter 71 shall engage in any business in this state other than the carrying of passengers for hire in common carrier motor vehicles, such company shall

be subject to a tax of two per cent measured by that portion of its total net income derived from such business but shall not be subject to the minimum tax computed under section 421c. Notwithstanding any other provisions of this chapter, any mutual savings bank owning at the end of the income year, real estate acquired for debt having an assessed valuation of ten per cent or more of its total assets shall, during the calendar years 1936 and 1937, be subject to the lesser of (1) the tax imposed by this chapter and (2) the tax imposed by chapter 68 as amended by section 355b of the 1933 supplement.

Section 419c, 1935 Supplement to the General Statutes:

Sec. 419c. Deductions from gross income. In arriving at net income as defined in section 417c whether or not the taxpayer is taxable under the federal corporation net income tax, there shall be deducted from gross income all items deductible under the federal corporation net income tax law effective and in force on the last day of the income year, except (1) federal taxes on income or profits, losses of prior years, interest received from federal, state and local government securities and specific exemptions, if any such deductions shall be allowed by the federal government and (2) interest and rent paid during the income year.

Section 420c, 1935 Supplement to the General Statutes:

Sec. 420c. Allocation of net income. If the trade or business of the taxpayer shall be carried on partly without the state, the business tax shall be imposed on a base which reasonably represents the proportion of the trade or business carried on within the state. The

allocation of the base of the tax measured by net income shall be made on the following basis: (1) Interest, dividends, royalties and gains from sales of intangible assets, less related expenses, when received by a company having its principal place of business within the state, shall be allocated to the state and, when received by a company having its principal place of business without the state, shall be allocated without the state; provided, when it can be clearly established that such income is received in connection with business within the state, such income shall be allocated to the state without regard to the location of the principal place of business of the taxpayer, and a similar rule shall apply to such income received in connection with business without the state; (2) gains from sales or rentals of tangible capital assets held, owned or used in connection with the trade or business of the taxpayer but not for sale or for rent in the regular course of business shall be allocated to the state if the property sold or rented be situated in the state prior to the sale or during the rental thereof, otherwise such gains shall be allocated outside the state; (3) net income of the above classes having been separately allocated and deducted as above provided, the remainder of the net income of the taxpayer shall be allocated and apportioned as follows: (a) Such income, when derived from business other than the manufacture, sale or use of tangible personal or real property, shall be specifically allocated within and without the state under rules and regulations of the tax commissioner; (b) when derived from the manufacture, sale or use of tangible personal or real property, the portion thereof attributable to business within the state shall be determined by means of an allocation fraction to be computed as the simple arithmetical mean of three

fractions. The first of these fractions shall represent that part of the average monthly fair cash value of the total tangible property held and owned by the taxpayer during the income year which is held within the state, without deduction on account of any incumbrance thereon but excluding any property the income of which is separately allocated under the foregoing provisions of this chapter. The second fraction shall represent the part of the total wages, salaries and other compensation to employees paid by the taxpayer during the income year from offices, agencies or places of business within the state, provided all such payments shall be assigned to the office, agency or place of business of the taxpayer at which the employee chiefly works, or from which he is sent out or with which he is chiefly connected. The third fraction shall represent the part of the taxpayer's gross receipts from sales or other sources during the income year, excluding any income which is specifically allocated under subdivisions (1) and (2) of this section, which is assignable to offices, agencies or places of business within the state, provided such receipts shall be assigned to that office, agency or place of business at or from which the transactions giving rise thereto are chiefly negotiated and executed.